of legal restrictions on the right of states to acquire territory by conquest, a right universally sanctioned by practice and in modern times pretty widely recognized in theory although in the middle ages strongly protested by the great international publicists.

The most illustrious spokesmen of the pre-modern traditional doctrine that no legal right of conquest exists and that conquest does not in itself constitute a basis for title to territory were St. Augustine, Vitoria, and Suarez. With Hugo Grotius in the early seventeenth century and still more emphatically with Vattel appeared the modern doctrine of the right of conquest and the legality of expansion by force. Dissenters from this generally accepted modern doctrine have continued in prominence, notably among Latin-American and continental European writers. Quite apart from the varying and sometimes conflicting theories of publicists, the general practice of acquiring territory by conquest has not lacked judicial and arbitral sanctions.

In recent years a significant number of agreements have been reached by various groups of states for the purpose of imposing restrictions on the right of expansion by conquest. The Monroe Doctrine is an early example, a unilateral political pronouncement based on the international principle of self-defense but affecting an entire hemisphere. Article X of the covenant of the League of Nations is another, followed by the Nine-Power Treaty of 1922 concerning China, the Pact of Paris in 1929 for the outlawry of war, and the Inter-American Conciliation Convention and the Inter-American Arbitration Treaty in the same year. Still more definite commitments to prohibit conquest by force were made in the Argentine Anti-War Pact and the Convention on Rights and Duties of States in 1933 and in the Principles of Inter-American Solidarity and Cooperation in 1936. To supplement these and possibly to implement them with a sanction, there has come into considerable prominence in the current decade the doctrine of non-recognition of the legality of any acquisition made by conquest. As a restraining influence, too, is the traditional state's duty of non-intervention, although its efficacy has been much clouded by conflicting conceptions of its observance in practice.

How soon the old law and the old practice will yield to the new trend depends upon the very disturbing and uncertain events of the immediate future. The author has very usefully brought together the facts relating to the legal aspects of one of the world's great problems.

ARNOLD J. LIEN.†

THE BOTTLENECKS OF BUSINESS. By Thurman W. Arnold. New York: Reynal & Hitchcock, 1940. Pp. xi, 335. $2.50.

This, the third of Mr. Arnold's expositions in book form, finds him in a new rôle and a new mood. He writes now as Assistant Attorney General of the United States in charge of the Antitrust Division of the Department of Justice, not as a free-lance critic of our economic, political and legal systems talking with the easy freedom that belongs to those whose only

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† Professor of Political Science, Washington University.

responsibility is an academic one. The conservatizing effect of the change in rôles is unmistakable. The Sherman Act is not now mere "economic meaninglessness"[1] but the only practical instrument at hand for the preservation of industrial, and therefore political, democracy in the United States.[2] The "liberal economic planners" are politically "impractical," apparently quite as much of an obstacle to "the practical reformer" as the "reactionary opposition to reform." Refusing to recognize the importance of "the traditional idea of states' rights" (though a political fact far more important "than anything any professor thinks up in a classroom"), the "political impossibility of delegating to the Executive Branch enough discretion to use taxing or spending to regulate business," or that "the idea of the separation of powers of the government is one of paramount practical utility" in devising a workable mechanics for removing "capitalized restraints of trade," these economic planners "seek the simplicity and symmetry of new legislative brooms that never work * * *." Not only does Mr. Arnold doubt the political sagacity of those of his former intellectual climate; he is more shy of their glittering economic panaceas and their enthusiasm for concentration of power in political organs.[3] "It is unnecessary to argue today," says he, "against a planned political state in America so long as Europe is presenting us with a clinical example of the working of that great delusion." As for Germany specifically, the consumers' movement there to stave off a state-controlled economy failed "perhaps because there were so many economic planners in Germany—so many believers in the rationalized state * * *." In the United States "we are fortunate in possessing the strongest tradition in favor of free enterprise of any country in the world enforced by an agency of government the further removed from political pressure of any branch." "The administration of justice in every civilized country is the only balance wheel against political pressure." But perhaps most interesting of all is Mr. Arnold's now expressed preference, in administration of broad policy, for the historic judicial process as against the streamlined administrative process. Although his celebrated comparison of commissions and courts in the *Symbols of Government*[4] was pointed to the difference in public acceptance that can result from protective symbolisms, there lurked beneath an impatience with the resulting view of judicial superiority; while in the present book the preference for orthodox Sherman Act procedure is clearly born of a belief in its inherent as well as its psychological advantages over "a shiny new administrative machine." Even the oft-criticized slowness of legal procedure, which the

1. Arnold, *The Folklore of Capitalism* (1937) 96.
2. Arnold, *The Bottlenecks of Business* (1940) 91 et seq.
3. Although in his earlier writings Mr. Arnold did not have particular occasion to advocate specifically either economic palliatives or political methods for achieving ends desired, a perusal of The New Deal Is Constitutional (1933) 77 New Republic 8; *The Symbols of Government* (1935); *The Folklore of Capitalism* (1937); and, A Reply [to opponents of the Court plan] (1937) 23 A. B. A. J. 364, turns up unmistakable clues of adherence to objectives and methods now on at least the doubtful list.
4. (1935) 199-206.

streamlined administrative body would most certainly mitigate, "paradoxically enough * * * seems actually to aid in antitrust enforcement."

In this new mood, the nation's present head of antitrust enforcement offers his diagnosis of what ails the body politic and confidently advances a sure cure. The diagnosis is along lines reasonably well accepted in most economic and political circles. Industrial democracy is declared to be "the only basis on which political democracy can rest"; "our economic structure consists of two separate worlds"—organized industry, unorganized production and consumer groups. "In the first world we have concentrated control, which makes possible high and rigid prices * * *. In the second world, we find competition, low flexible prices, large production and labor standards often at starvation levels"; this "unbalance of prices" is the consequence of the creation of endless "economic toll bridges" that lie athwart the road to full distribution of capacity production; the great need is, therefore, "to guard against the private seizure of power over a free market."

Noteworthy is the fact that "Doctor" Arnold's diagnosis puts the finger of blame on market clogs created by "*private* conspiracies." Here and there, especially in discussion of the building industry tangle, he does recognize that state and municipal enactments may be but the barriers of weaker market groups which made up in political influence what they lacked in economic power; price fixing "even where it is administered by the government * * * needs the utmost scrutiny and safeguards." But withal, "we can survive the legislative grants of power because what has been granted by the democratic process can be safeguarded and can be taken away by the same democratic process. * * * It is the private seizure of industrial power that builds the kind of irresponsible organizations which can wreck a democracy. That power is subject to no election every four years." Such a view is bottomed on an optimism regarding the actualities of legislative processes that all cannot share; Mr. Arnold's own economic man Friday is inclined to treat all market barriers with equal seriousness regardless of whether they travelled the route of private or of public "legislative" channels.[5] To believe that the ship of state can periodically free itself of economic barnacles of its own doing is to assume a control of the situation which Mr. Arnold categorically denies is possessed where the barrier to "free exchange in a free market" does not enjoy the blessings of public entrenchment. The seriousness of the disease lies not in its source but in its nature; the barriers that have contributed to the breakdown of more than one erstwhile European democracy have been "public" as well as private in their origin. At all events, doubts on this score together with the unrealized magnitude of publicly-created barriers in this country suggest further consideration as to whether the total need is not to guard against pseudo "public" as well as against private seizure of power over the market. Factual data for such consideration will be made available in the Spring, 1941, issue of *Law and Contemporary Problems.*

If Mr. Arnold draws distinctions between bottlenecks on the basis of the method of their creation, he nevertheless has no favorites when it comes to those for or by whom the barriers are established. With evident approval

he cites the *Borden*,[6] *American Medical Association*,[7] *Ethyl Gasoline Corp.*[8] and *Apex*[9] cases for their doctrine that no group or industry is above the Sherman law. To "Restraints of Trade Among the Under-Dogs," indeed, he devotes an entire chapter in support of the position enunciated in his well known public letter to the Central Labor Union of Indianapolis, a position which, as he says, earned him the opposition of not only labor organizations but also "the type of liberal who could not see any kind of fault in an organization which had once enlisted his sympathy." To all, without favoritism but with intelligent adaptability to the group involved, he would apply the test of "efficiency and service—not size" as he elaborates it in Chapter 6.

"Doctor" Arnold's cure for what ails us, one can easily surmise, is reliance upon the due-process-like sweep of the Sherman Act enforced in the courts of the land by the Department of Justice. It is "the front line of defense against the unreasonable use of industrial power," the "only government instrument which appears to be effective in maintaining a free market and in acting as a balance wheel against the special privileges granted by Congress to particular groups * * *." Arnold is convinced that with antitrust enforcement "It is not a difficult task to maintain a free market. It does not require nearly the number of policemen that are necessary to keep traffic flowing freely." An adequate prosecuting group is indeed needed "to break up the organizations imposing restraints" and this economic-legal atomizing must be done on the "shock" principle "that all restraints should be attacked simultaneously." But after this "one or two men assigned permanently in each state to preserve the gains" can provide the necessary "slight supervision to keep the market free." How this technique has successfully worked in cleaning up the milk and building businesses is shown, as indeed is the way in which a Departmental "economic policeman" arrested a patent licensing system to control the price of nylon. Chapter 10 brings out that Mr. Arnold now desires the funds necessary to apply the same technique to the "Bottlenecks Between the Farm and the Table." That Mr. Sherman's tonic will get Uncle Sam well many have been inclined to doubt, some because of a conviction that a more fundamental cure is indicated, others because of a belief that the economic aches of all our many joints can never be eliminated by relying exclusively upon this one medicine. But the country doctor has his answer. To the advocates of a "radical Utopia of planning" his retort is that "the pendulum is swinging against broad general solutions" and toward "the tiresome job of handling smaller and more concrete problems in the light of their particular facts." With those who question the efficacy of legislation in universals he is in agreement; "You cannot solve the problems of the distribution of steel by

5. Edwards, Trade Barriers Created by Business (1940) 16 Ind. L. J. 169.

6. United States v. Borden Co. (1939) 308 U. S. 188.

7. United States v. American Medical Ass'n (App. D. C. 1940) 110 F. (2d) 703.

8. Ethyl Gasoline Corp. v. United States (1940) 309 U. S. 436.

9. Apex Hosiery Co. v. Leader (1940) 310 U. S. 469.

the same kind of organization necessary for the effective distribution of motion pictures." Specialized treatment industry by industry is called for; but, paradoxically enough, it is just "in such a situation [that] the method of the Sherman Act comes into its own." For is not the glory of the lawyer cautious advancement "case by case"?

But even granting that the Sherman Act offers a fairly successful course of treatment, the question remains whether administration of the medicine through judicial, civil, and criminal processes will be effective. Bankruptcy and Antitrust remain the two great areas of administration only touched as yet by the rise of the new administrative process. Is it reasonable to believe they should be saved to a process otherwise deemed inadequate? Speaking of course only for Antitrust, Mr. Arnold expresses his conviction that present procedure "is more effective to enforce the broad ideal of a free market on a nation-wide scale than any administrative tribunal * * *." This greater effectiveness arises essentially from the fact that "the formula of the Sherman Act is a good deal like the formula of due process" and "Only courts of general jurisdiction can express the philosophy of such a background. Administrative tribunals are not protected by the reverence induced by judicial robes." If it be said that past experience does not stimulate confidence in the efficacy of this mode of administration, Arnold has an answer, though it steps on the toes of those who preceded him in the office he now holds.[10] The answer is that until his appointment "The trouble has been that enforcement has been predominantly in private hands" and therefore "used only for private purposes." Public enforcement was "hit-or-miss," "sporadic and indefinite"; this in turn because "until the last two years, we have never given the Department of Justice an adequate staff." But if a continuous, consistent prosecution policy by an adequately-manned staff can produce effectiveness in administration, it also raises questions as to possible abuse of discretion even though its productivity in fines squares it with "the drive for balancing the budget." Arnold recognizes the criticism of "little dictatorship" that has been levelled at him for his use of the consent decree. This criticism is, however, shown in Chapter 7 to be based upon "misrepresentation" and "sabotage"; as now utilized, the consent decree is a straightforward enforcement device adequately safeguarded from abuse by public submission to "the federal court * * * with an opportunity given for everyone to object." There being, therefore, nothing to worry about in this traditional, politically-accepted technique of judicial enforcement, considerations in its favor point to the desirability of its retention as against adoption of the more questionable administrative technique.

The Bottlenecks of Business is not as well written as the author's earlier books, nor is it nearly so instructive or provocative. Save perhaps for the description of the present use of the consent decree it offers nothing new to the student of business regulation. But for what it was clearly in-

10. See McAllister, Book Review (1940) 26 Iowa L. Rev. 183, for criticism of Mr. Arnold's attitude by one who was formerly special assistant to the Attorney General, Antitrust Division.

tended to do—to "sell" the Sherman Act and Mr. Arnold's present program to the man in the street—one cannot gainsay that the book has an effectiveness all its own.

FRANK R. STRONG.†

† Visiting Professor of Law, Duke University.